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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VICKI HUFF, on behalf of herself and all others similarly situated, Plaintiff, v. LIBERTY LEAGUE INTERNATIONAL, LLC, an Arizona Corporation; BEYOND FREEDOM PUBLISHING, LLC, an Arizona Corporation; BRENT PAYNE; SHANE KRIDER; LIBERTY LEAGUE HOLDINGS, LLC, an Arizona Corporation, formerly known as BIG ASS BRITCHES HOLDINGS, LLC, an Arizona Corporation; and Does 1-100, inclusive, Defendants.	Case No. EDCV 08-1010-VAP (SSx) **[Motion filed on January 26, 2009]** **ORDER GRANTING (1) MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, (2) MOTION TO COMPEL ARBITRATION, (3) MOTION TO DISMISS, AND DENYING MOTION TO STRIKE**

Defendants' (1) Motion to Dismiss for Lack of Personal Jurisdiction, (2) Motion to Compel Arbitration, (3) Motion to Dismiss for Failure to State a Claim, and (4) Motion to Strike certain allegations in Plaintiff's

Complaint came before the Court for hearing on April 6, 2009. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS the Motion to Dismiss for Lack of Personal Jurisdiction, GRANTS the Motion to Compel Arbitration, GRANTS the Motion to Dismiss for failure to state a claim, and DENIES the Motion to Strike certain allegations in Plaintiff's Complaint.

I. BACKGROUND

A. Factual Allegations

On August 15, 2006, Plaintiff Vicki Huff purchased a Liberty League Starter Kit and Beyond Freedom Home Study Course from the Liberty League Internet website, http://libertyleague.com. (FAC ¶¶ 60, 62.) Before purchasing those products, Plaintiff was required to complete an online "Associate Application Agreement" that required assent to certain terms and conditions. (Boisnier Decl. ¶¶ 4, 10.) Plaintiff subsequently purchased certain products and tickets to attend Liberty League conferences, which required assent to identical terms and conditions to which Plaintiff assented previously. (FAC ¶¶ 64, 65.)

Plaintiff alleges she spent over $30,000 on Liberty League products and conferences. (FAC ¶ 69.) According to Plaintiff, Liberty League engages in a multi-level marketing scheme similar to a pyramid scheme; Liberty League employees fraudulently misled Plaintiff into purchasing Liberty League products and services and tricked her into believing she would earn lucrative income and attain financial freedom. (Id. at 20.)

B. Procedural History

On July 25, 2008, Plaintiffs Vicki Huff, Sarah McDowell, and Lynne Milsom, filed a lawsuit in this Court against Defendants Liberty League International, LLC, Beyond Freedom Publishing, LLC, Brent Payne, Julie Payne, Shane Krider, Michelle Krider, and Liberty League Holdings, LLC alleging the following claims: (1) violation of RICO, through transporting and receiving stolen money, 18 U.S.C. § 1962(c)-(d); (2) violation of RICO through mail and wire fraud, 18 U.S.C. § 1962(c)-(d); (3) violation of consumer protection statutes; (4) violation of state and federal anti-pyramid statutes; and (5) unjust enrichment.

On October 17, 2008, Defendants filed a "Motion to (1) Compel Arbitration, or in the Alternative to (2) Transfer the Case to the District Court of Arizona, or (3) Dismiss the Complaint for Lack of Personal

Jurisdiction, or (4) Dismiss the Case for Failure to State a Claim, or (5) For a More Definite Statement." On December 5, 2008, instead of opposing the Motion, Plaintiff Vicki Huff ("Plaintiff") filed an amended putative class action Complaint ("First Amended Complaint" or "FAC"), which removed Defendants Julie Payne and Michelle Krider and the RICO claims, but added claims that Defendants violated California Business and Professions Code Sections 17200 and 17500.[1]

On January 26, 2009, Defendants filed a "Motion to: (1) Compel Arbitration; (2) Dismiss the Case for Failure to State a Claim (or Alternatively to Require a More Definite Statement); (3) Dismiss or Strike Claim for Injunctive Relief and Strike Irrelevant Allegations; and (4) Dismiss the Complaint for Lack of Personal Jurisdiction," the Declaration of Cathy Flanagan ("Flanagan Declaration"), the Declaration of Nadine Boisnier ("Boisnier Declaration"), and the Declaration of David R. Burtt ("Burtt Declaration"). On March 2, 2009, Plaintiff filed Opposition and the Declaration of Patricia N. Syverson ("Syverson Declaration"). On March 23, 2009, Defendants filed a Reply.

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[1] Confusingly, Plaintiff's FAC identifies each Defendant as a party under the heading "Parties," but then refers to all Defendants throughout the FAC as "Defendants" without alleging which Defendant did what, or how the Defendants interacted or related to one another in the context of the purported wrongful scheme.

II. DISCUSSION

A. Motion to Dismiss for Lack of Personal Jurisdiction

Defendants move the Court to dismiss the FAC because the Court lacks personal jurisdiction over Defendants Beyond Freedom Publishing, LLC, Brent Payne, Shane Krider, and Liberty League Holdings, LLC.[2] (See Mot. at 19-23; Reply at 11-14.)

1. Legal Standard

Due process requires that nonresident defendants have certain "minimum contacts" with the forum state so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. Int'l Shoe v. Washington, 326 U.S. 310 (1945). "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its law." Hanson v. Denckla, 357 U.S. 235, 253 (1958).

A court may exercise personal jurisdiction over a nonresident defendant generally or specifically. Doe v. Am. Nat'l Red Cross, 112 F.3d 1048, 1050 (9th Cir. 1997). Specific jurisdiction exists when: (1) the defendant

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[2] Contrary to Plaintiff's argument, Defendants do not argue the Court lacks jurisdiction over Liberty League International, LLC. (See Reply at 11.) Thus, Defendants consent to the Court's personal jurisdiction over Liberty League International, LLC.

purposefully avails himself of the "privilege of conducting activities in the forum;" (2) the claims arises "from the defendant's forum-related activities;" and, (3) is reasonable. See Data Disc, Inc. V. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977). Alternatively, a court has general jurisdiction when the defendant's activities within a state are "substantial" or "continuous and systematic." Id.

The plaintiff has the burden to establish a court's personal jurisdiction over a defendant. Cubbage v. Merchent, 744 F.2d 665, 667 (9th Cir. 1984), cert. denied, 470 U.S. 1005 (1985). The plaintiff need only demonstrate facts that, if true, would support jurisdiction over the defendant. Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995) (citations omitted); see also AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996) (where trial court rules on jurisdictional issue based on affidavits and discovery materials without holding evidentiary hearing, plaintiff need only make prima facie showing).

2. Discussion

a) Beyond Freedom Publishing, LLC

Plaintiff alleges "Defendant Beyond Freedom Publishing, LLC is an Arizona corporation. At all relevant times, Beyond Freedom Publishing was in the

business of publishing personal development products for Liberty League Int'l." (FAC at ¶ 15.) This allegation fails to show any basis for the Court to exercise personal jurisdiction over this Defendant, either generally or specifically.

Plaintiff does not allege Beyond Freedom Publishing, LLC, has had any contact with California whatsoever, let alone any contacts sufficient to satisfy the Court's jurisdictional requirements. See Calder v. Jones, 465 U.S. 783, 789-90 (1984) ("Each defendant's contacts with the forum State must be assessed individually.") Instead, Plaintiff argues Beyond Freedom Publishing, LLC's alleged association with Liberty League International is sufficient to confer jurisdiction here; this is an inadequate basis. See Davis v. Metro Productions, Inc., 885 F.2d 515, 520 (9th Cir. 1989) ("a person's mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over that person"). Accordingly, the Court GRANTS Defendants' Motion on this basis, with leave to amend.

b) Brent Payne & Shane Krider

Plaintiff alleges Mr. Payne and Mr. Krider "are and were, at all relevant times, co-founders and managers of Defendant Liberty League Int'l. As such, they directed,

managed and controlled the operations of Defendant Liberty League Int'l. Payne and Krider are residents of the state of Arizona." (FAC at ¶ 16.) Plaintiff also alleges they "are and were, at all relevant times, co-founders and managers for Beyond Freedom Publishing." (Id. at ¶ 15.)

Plaintiff does not meet her burden of showing the Court has personal jurisdiction over these Defendants; there is no allegation that they purposefully availed themselves of conducting business in California, nor that the claims against them arise out of their contact with California, nor any other basis that would show the Court reasonably could exercise either general or specific jurisdiction over these Defendants. See Calder v. Jones, 465 U.S. at 789-90; Davis v. Metro Productions, Inc., 885 F.2d at 520; Brown v. Gen. Steel Domestic Sales, LLC, 2008 WL 2128057, at *10 (C.D. Cal. 2008) ("The fact that a corporation is subject to jurisdiction in the forum state, however, does not necessarily confer jurisdiction over its individual officers. Instead, the court must examine the individual's contacts with the forum to determine if they are sufficient to warrant the exercise of jurisdiction over him in connection with forum-related claims.").[3]

[3] In her Opposition, Plaintiff argues Mr. Krider and Mr. Payne are the "guiding spirit" or "central figures" (continued...)

Plaintiff does not meet her burden of showing the Court may exercise either specific or general personal jurisdiction over these Defendants. Accordingly, the Court GRANTS Defendants' Motion on this issue, with leave to amend.

c) Liberty League Holdings, LLC

Plaintiff alleges Liberty League Holdings, LLC is "an Arizona Corporation. At all relevant times, LL Holdings was a manager of Liberty League Int'l. As such, it directed, managed and controlled the operations of Defendant Liberty League Int'l." (FAC at ¶ 17.) Again, this allegation is insufficient for the Court to determine whether or not it can exercise personal jurisdiction over this Defendant, either generally or specifically. As discussed above, Plaintiff does not allege any contacts between this Defendant and California. Without any facts to support the Court's exercise of personal jurisdiction over this Defendant, the Court GRANTS Defendants' Motion on this issue, with leave to amend.

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[3](...continued)
in the challenged conduct. (See Opp'n at 23.) This argument is irrelevant to the question of whether the Court can exercise of personal jurisdiction over these Defendants; assuming Plaintiff would seek to allege this in an amended pleading, it would not form any basis for exercising jurisdiction over these Defendants, either generally or specifically. Plaintiff fails to allege these Defendants had any contacts with California whatsoever.

d) Limited Jurisdictional Discovery

At the hearing, Plaintiff's counsel requested leave to conduct limited jurisdictional discovery, in order to take the depositions of Defendants Brent Payne and Shane Krider to determine the corporate structures of Defendants. Finding good cause, the Court grants Plaintiff leave to conduct these depositions, limited in scope to questions regarding jurisdiction. See Terracom v. Valley Nat. Bank, 49 F.3d 555, 562 (9th Cir. 1995). Plaintiff must conduct these depositions no later than May 4, 2009 and file an amended complaint no later than May 26, 2009.

B. Motion to Compel Arbitration

Defendants move the Court to compel arbitration of Plaintiff's claims, based on the arbitration clause contained in the parties' contracts.[4]

In the "Associate Application and Agreement Terms and Conditions" contract between Plaintiff and Defendants,

[4] On August 15, 2006, Plaintiff purchased a Liberty League start-up kit and agreed to the terms and conditions set forth in Exhibit 1 to the Boisnier Declaration. (Boisnier Decl. at ¶ 10.) On September 5, 2006, Plaintiff purchased tickets to a Liberty Conference and she agreed to the terms and conditions set forth in Exhibit 3 to the Boisnier Declaration. (Id. at ¶ 11.)

attached by Defendants as Exhibit 1[5] to the Boisnier Declaration, the arbitration provision reads as follows:

> "14. Any dispute or lawsuit relating to or arising out of this Application and Agreement, Company's Rules, Company's Associate Policies and Procedures, or any other disagreement between the parties shall be resolved by binding arbitration in accordance with the Rules of Commercial Arbitration of the American Arbitration Association. Arbitration shall be held in Maricopa County, State of Arizona. Judgment upon the award rendered may be entered in any court of competent jurisdiction. In the event this arbitration provision is declared invalid or unenforceable for any reason by a court of competent jurisdiction, the parties agree that venue and jurisdiction shall be in the courts of the State of Arizona, Maricopa County or applicable Federal courts. The laws of the State of Arizona govern this Application and Agreement."

(See Boisnier Decl., Ex. 1 at ¶ 14.)

In the "Conference Ticket Purchase Terms and Conditions" contract between Plaintiff and Defendants,

[5] Plaintiff makes no objection to this document's authenticity or accuracy.

attached by Defendants as Exhibit 3[6] to the Boisnier Declaration, the arbitration reads as follows:

> "12. ARBITRATION; VENUE. Any controversy, claim, action or lawsuit relating to or arising out of the ticket purchase and these Terms or Conditions, or any other disagreement between the parties shall be resolved by binding arbitration in accordance with the Rules of Commercial Arbitration of the American Arbitration Association. Arbitration will be held in Maricopa County, State of Arizona. Judgment upon the award rendered may be entered in any court of competent jurisdiction. In the event this arbitration provision is declared invalid or unenforceable for any reason by any court of competent jurisdiction, parties agree that venue and jurisdiction shall be in the courts of the State of Arizona, Maricopa County or applicable federal courts serving this jurisdiction. The laws of the State of Arizona shall govern the ticket purchase and these Terms and Conditions."

(See Boisnier Decl., Ex. 3 at ¶ 12.)

1. Legal Standard

Under the Federal Arbitration Act ("FAA"), "upon being satisfied that the making of the agreement for

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[6] Plaintiff does not object to the authenticity or accuracy of this document either.

arbitration . . . is not in issue the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. The district court must determine (1) whether a valid, enforceable arbitration agreement exists and (2) whether the claims asserted in the complaint are within the scope of the arbitration agreement. Id.; Howard Elec. & Mech. Co., Inc. v. Frank Briscoe Co., Inc., 754 F.2d 847, 849 (9th Cir. 1985); Chiron Corp. v. Ortho Diagnostic System, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000).

The FAA requires that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Commerce is defined as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . ." 9 U.S.C. § 1. Through the FAA, Congress created a liberal federal policy favoring arbitration agreements. Perry v.

Thomas, 482 U.S. 483, 489 (1987) (quoting Moses H. Cone Memor'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

"[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . ." Moses, 460 U.S. at 24-25. "The standard for demonstrating arbitrability is not high.. . . Such [arbitration] agreements are to be rigorously enforced." Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999) (citations omitted).

The FAA's enactment "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." Volt Info. Sciences, Inc. v. Board of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989). "[T]he FAA does not require parties to arbitrate when they have not agreed to do so . . . . It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Id.

2. Discussion

Defendant argues the arbitration provisions at issue here are valid, enforceable, and encompass this dispute. (See Mot. at 6-7.) Plaintiff seeks to avoid arbitration

on the basis that the arbitration clause is unconscionable.

As an initial matter, the Court must address the dispute between the parties as to what law applies here; Plaintiff argues California law applies, whereas Defendants argue Arizona law applies.

a) Choice of Law

The parties agree California choice of law analysis should govern the enforcement of the choice of law provision. (See Opp'n at 2; Reply at 2, n.1.; see also Orr v. Bank of Am., 285 F.3d 764, 772 n.4 (9th Cir. 2002) (federal court sitting in diversity applies the forum state's choice of law rules).) California uses the test set forth in Nedlloyd Lines B.V. v. Superior Court to determine whether to enforce a choice of law provision. 3 Cal. 4th 459 (1992). This test draws heavily on section 187 of the Restatement Second of Conflict of Laws ("Restatement"). Id. at 464-66.

Under Nedlloyd, California will apply the law indicated by the choice of law provision where: "(1) the chosen state has a substantial relationship to the parties or their transaction," or where "(2) there is any other reasonable basis for the parties' choice of law." Id. at 466. "If neither of these tests is met,

that is the end of the inquiry, and the court need not enforce the parties' choice of law." Id.

Where either test is met, the court proceeds to the second step and "determine[s] whether the chosen state's law is contrary to a fundamental policy of California." Id. at 466. Where "there is a fundamental conflict with California law," the court proceeds to the third step and "determine[s] whether California has a materially greater interest than the chosen state in the determination of the particular issue. If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy." Id. at 466 (internal citations and quotations omitted).

1. Substantial Relationship

Applying the Nedlloyd test here, the court must first determine "whether the chosen state has a substantial relationship to the parties or their transaction . . . ." Nedlloyd, 3 Cal. 4th at 466. This requirement is easily satisfied: the corporate Defendants are incorporated in Arizona and the individual Defendants are domiciled in Arizona; thus there is a substantial relationship with Arizona. See Nedlloyd, 3 Cal. 4th at 467.

2. Fundamental Policy

As a substantial relationship exists, the court next "determine[s] whether the chosen state's law is contrary to a *fundamental* policy of California" or that of a third state. Nedlloyd, 3 Cal. 4th at 466, 467 n.5. Where enforcement of the choice of law provision would run counter to a fundamental policy of California or a third state, then the court must refuse to enforce the choice of law provision if it finds that "California has a 'materially greater interest than the chosen state in the determination of a particular issue . . . .'" Id. at 466.

There is no bright-line definition of a "fundamental policy." Restatement § 187 comment g. A fundamental policy must be "substantive," and "may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power." Id.

Here, Plaintiff argues enforcing Arizona law would frustrate California's strong public policy to "protect consumers against unfair and deceptive business practices." (See Opp'n at 2 (quoting Doe 1 v. AOL LLC, 552 F.3d 1077, 1083-84 (9th Cir. 2009).) Plaintiff provides the Court with significant authority to show California's fundamental policy of protecting consumers,

especially in the class action context. (See Opp'n at 2-3.) Plaintiff, however, does not meet her burden of showing California's public policy would be frustrated by applying Arizona law in this case. Nedlloyd, 3 Cal. 4th at 468. Arizona may have the same public policy interest as California; Plaintiff does not show Arizona law is contrary to or deficient with respect to protecting this California public policy.

Accordingly, as Plaintiff has not shown California's fundamental interest would be frustrated by applying Arizona law here, the Court does not reach the last step of the analysis, which would otherwise require examination of whether or not California had a materially greater interest than Arizona in applying its own law to this case. Id. at 466. Arizona law applies here.

b) Unconscionability

Plaintiff argues the arbitration provisions in Defendants' contracts are unconscionable.[7] Under Arizona law, "substantive unconscionability, whether alone or in combination with procedural unconscionability, is sufficient to render a contract unconscionable and, thus,

[7] As Defendants point out in their Reply, Plaintiff does not dispute that her claims are governed by the arbitration provisions; rather, Plaintiff argues the provisions cannot apply because they are unconscionable. (See Reply at 1.)

unenforceable." Batory v. Sears, Roebuck and Co., 124 F. App'x 530, 532-33 (9th Cir. 2005).

Plaintiff argues Defendants' contracts are unconscionable procedurally, as they are unenforceable contracts of adhesion.[8] "An adhesion contract is typically a standardized form offered to consumers of goods and services on essentially a take it or leave it basis without affording the customer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract." Broemmer v. Abortion Serv. of Phoeniz, LTD, 840 P.2d 1013, 1015 (Ariz. 1992) (internal quotations and citations omitted).

Here, Defendants' contracts containing the arbitration provision are contracts of adhesion: the documents are pre-printed and available online; there is no opportunity to "opt out" or negotiate the terms; and, Plaintiff had no meaningful choice to obtain Defendants' products through a reasonable alternative, without assenting to Defendants' terms. Although these are adhesion contracts, this alone does not render them

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[8] Unlike California law, Arizona law differentiates claims that a contract is one of adhesion from claims of procedural unconscionability. Under Arizona law, to be rendered unenforceable, the adhesion contract must contain terms contrary to the reasonable expectations of the parties or be unconscionable. Batory, 124 F. App'x at 532.

unenforceable; the terms also must be contrary to the parties' reasonable expectations or be unconscionable. Broemmer, 840 P.2d at 1016; Batory, 124 F. App'x at 532.

Plaintiff argues the arbitration terms are unconscionable because they "require Plaintiff to bear the burden of all attorneys' fees and costs for both parties" and because they constituted an unfair surprise, as they were "not clearly identified under a separate heading." (Opp'n at 4, 7.) "Substantive unconscionability requires an examination of the actual terms of the contract and the relative fairness of the obligations assumed by each party. Indicati[ons] of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity." Batory v. Sears, Roebuck & Co. ("Batory II"), 456 F. Supp. 2d 1137, 1140 (D. Ariz. 2006).

Turning first to Plaintiff's contentions regarding the contract's attorneys' fees clause, attorneys' fees provisions in the "Associate Application and Agreement Terms and Conditions" and "Conference Ticket Purchase Terms and Conditions" are substantially similar. The former reads as follows:

> "10. Applicant agrees to pay any and all costs, including without limitation reasonable attorneys' fees, incurred by Company as a result of any violation of this Application and Agreement or any Rule, Policy or Procedure of the Company or any other dispute between Company and Applicant. In the event any portion of this Application and Agreement at any time, for any reason, is determined to be void or superseded, the provision of this paragraph shall survive."

(See Boisnier Decl., Ex. 1 at ¶ 10.) The Conference Ticket provision reads as follows:

> "13. ATTORNEYS' FEES; COSTS. Attendee agrees to pay any and all costs, including without limitation reasonable attorneys' fees, incurred by Company as a result of any violation of these Terms and Conditions by Attendee or any other dispute between Company and Attendee. In the event any portion of these Terms and Conditions at any time, for any reason, are determined to be void or superseded, the remaining portions of the foregoing Terms and Conditions and the provisions of this paragraph shall survive."

(See Boisnier Decl., Ex. 3 at ¶ 13.)

Here, the attorneys' fees provisions clearly show "an overall imbalance in the obligations and rights imposed by the bargain" and "significant cost-price disparity."

As Plaintiff points out, less offensive provisions - so called "loser pay" provisions - have been found unconscionable. See Porkorny v. Quixtar, Inc., 2008 WL 850358, at *19 (N.D. Cal. 2008); Veliz v. Cintas Corp., 2004 WL 2452851, at *22 (N.D. Cal. 2004). The attorneys' fees provisions in Defendants' contracts, whereby Plaintiff must always pay Defendants' attorneys' fees, even if Plaintiff ultimately prevails, clearly constitute substantive unconscionability. Batory II, 456 F. Supp. 2d at 1140.

Lastly, the Court does not find persuasive Plaintiff's argument that the arbitration clause constituted unfair surprise because it lacked a separate heading. Defendants cite several persuasive case to show courts across the country have enforced so-called "clicking agreements" that contain arbitration clauses. (See Mot. at 7 (citing Hauenstein v. Softwrap, LTD, 2007 WL 2404624, at *3 (W.D. Wash. 2007); Feldman v. Google, Inc., 2007 WL 966011, at *5-8 (E.D. Pa. 2007); DeJohn v. The TV Corp. Int'l, 245 F. Supp. 2d 913, 916 (N.D. Ill. 2003)).) Here, Plaintiff had notice of the terms within the agreement and clicked in a box that she agreed to the terms; the onus was on Plaintiff to read the terms provided to her by Defendants and to indicate if she did not assent to the terms.

Plaintiff states she does not recall seeing the arbitration provision in the contracts; however, Plaintiff does not dispute the authenticity or accuracy of the contracts Defendants provided to the Court that contain such provisions to which Plaintiff assented on August 15, 2006 and September 5, 2006. Thus, despite Plaintiff's protestations that she lacks a clear memory of reading the arbitration provision, Plaintiff had notice and assented to it.

Accordingly, the Court does not find the entire arbitration clause unconscionable; rather, only the attorneys' fees provision.

3. Remedy

Upon finding a clause within a contract unconscionable, the Court may (1) refuse to enforce the contract; (2) enforce the remainder of the contract without the unconscionable clause; or (3) limit the application of the unconscionable clause as to avoid any unconscionable result. See Ariz. Rev. Stat. Ann. § 47-2302(A). In the interest of justice, the Court severs the substantively unconscionable attorneys' fees provision and enforces the remainder of the contract, including the arbitration provision.

Plaintiff argues the attorneys' fees provisions are not severable, based on the language in the provisions that they apply even if any other provision in the contracts is voided. (See Opp'n at 6 n.3.) This argument is not availing; the Court severs these provisions, so they are no longer in effect. By doing so, contrary to Plaintiff's argument, the Court does not re-write the contract for the parties; rather, it severs only the unlawful part and enforces the remainder. See Olliver/Pilcher Ins., Inc. v. Daniels, 715 P.2d 1218, 1220-21 (Ariz. 1986).

C. Motion to Dismiss For Failure to State a Claim

Defendants move the Court to dismiss Plaintiff's Unfair Competition Law ("UCL") claims for failure to state a claim and failure to plead with particularity under Federal Rule of Civil Procedure Rule 9(b) ("Rule 9(b)").

1. Legal Standard

Under Rule 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. As a general matter, the Federal Rules require only that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly,

550 U.S. 544, 127 S. Ct. 1955, 1964 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). In addition, the Court must accept all material allegations in the complaint -- as well as any reasonable inferences to be drawn from them -- as true. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic, 127 S. Ct. at 1964-65 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id. at 1965.

Although the scope of review is limited to the contents of the complaint, the Court may also consider exhibits submitted with the complaint, Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), and "take judicial notice of matters of public record outside the pleadings," Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

2. Discussion

Plaintiff alleges Defendants intentionally induced prospective consumers through knowingly deceptive, misleading, and false business practices, to the detriment of the prospective consumers. (See FAC ¶¶ 2, 3, 7, 19, 26-28, 32-34, 79-80, 83, 86.) Plaintiff brings this claim under California law. As the Court has concluded Arizona law applies here, the Court grants Defendants' Motion and dismisses Plaintiff's California UCL claims, with leave to amend to bring these claims under Arizona law.

D. Motion to Dismiss or Strike Injunctive Relief and Irrelevant Allegations

Defendants move the Court to dismiss, or strike, Plaintiff's claim for injunctive relief and strike portions of Plaintiff's FAC that describe an Arizona Attorney General investigation. (See Mot. at 16-19.)

1. Injunctive Relief

Defendant argues Plaintiff does not have standing to seek injunctive relief because she cannot show she is threatened by a likely repetition of Defendant's violation of UCL. As the Court has granted Defendants' Motion to Dismiss Plaintiff's UCL claims, Plaintiff cannot obtain the remedy sought for the alleged California UCL violations. Accordingly, Defendants'

Motion to Dismiss Plaintiff's prayer for injunctive relief is denied as moot.

2. Discussion of Arizona Attorney General Investigation

Defendant moves the Court to strike the portions of Plaintiff's FAC that discuss an Arizona Attorney General investigation into Defendants' alleged scheme. Under Federal Rule of Civil Procedure 12(f), a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983).

Defendant argues "what may have happened as a result of an earlier investigation conducted by the Arizona Attorney General's office can have no bearing on whether Defendants engaged in unfair business practices in California." (See Mot. at 18.) The Court is not persuaded by this argument; these allegations are relevant to Plaintiff's claims. See Fed. R. Evid. 401. Furthermore, Defendants show no prejudice to them caused

by these allegations. Accordingly, the Court DENIES Defendants' Motion to strike these allegations.

III. CONCLUSION

For the foregoing reasons, the Court reaches the following conclusions:

1. The Court GRANTS Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, as to Defendants Beyond Freedom Publishing, LLC, Liberty League Holdings, LLC, Brent Payne, and Shane Krider, with leave to amend;
2. The Court GRANTS Defendants' Motion to Compel Arbitration;
3. The Court GRANTS Defendants' Motion to Dismiss Plaintiff's Unfair Competition Law Claim, with leave to amend; and
4. The Court DENIES AS MOOT Defendants' Motion to Dismiss Plaintiff's prayer for injunctive relief, and DENIES Defendants' Motion to Strike Portions of Plaintiff's FAC.

Plaintiff must file a second amended Complaint no later than May 26, 2009. The parties over which the Court has personal jurisdiction are compelled to arbitrate Plaintiff's claims.

Dated: April 14, 2009

VIRGINIA A. PHILLIPS
United States District Judge